

Sep 18, 2018

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jonathan B.¹,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

No. 4:17-CV-05139-EFS

**ORDER RULING ON CROSS MOTIONS
FOR SUMMARY JUDGMENT**

CLERK'S OFFICE ACTION REQUIRED

Before the Court are the parties' cross motions for summary judgment, ECF Nos. 12 & 14. Plaintiff Jonathan B. appeals a denial of benefits by the Administrative Law Judge (ALJ). ECF No. 12. He alleges the ALJ erred by (1) improperly rejecting the opinions of his school psychologist and teachers; (2) rejecting lay witness testimony; (3) rejecting Plaintiff's subjective complaints; (4) finding that he did not meet a listing; (5) failing in his step five analysis; and (6) failing to grant child disability benefits from November 21, 2012 through December 13, 2013. ECF No. 12 at 2. The Commissioner of Social Security (Commissioner) asks the Court to affirm the ALJ's decision finding Plaintiff not disabled. ECF No. 14 at 20-21.

¹ To protect the privacy of social-security plaintiffs, the Court refers to them by first name and last initial. See proposed draft of LCivR 5.2(c). When quoting the Administrative Record in this order, the Court will substitute "Plaintiff" for any other identifier that was used.

1 After reviewing the record and relevant authority, the Court grants
2 the Commissioner's motion for summary judgment, ECF No. 14, and denies
3 Plaintiff's motion for summary judgment, ECF No. 12.

4 **I. Factual and Procedural Summary**²

5 Plaintiff was born on December 13, 1994, and is 23 years old.
6 Administrative Record (AR) 30. At the time of the hearing, he lived with
7 his grandmother. AR 44. He asserts that he has a history of
8 Autism/Asperger's syndrome.³ ECF No. 12 at 2. The ALJ concluded that
9 Plaintiff suffers from learning and affective disorders, but not Autism
10 or Asperger's syndrome. AR 23. Plaintiff participated in the special
11 education program in high school and graduated in January of 2016. AR
12 45. He has never had a paying job. AR 43-45. His hobbies include creating
13 YouTube videos and videogames, playing the guitar, playing videogames,
14 and going to church with friends. AR 25. He has also participated in
15 some volunteer activities. AR 25-26, 43-44, 514.

16 Plaintiff filed an application for Supplemental Security Income
17 (SSI) on November 21, 2012, alleging disability beginning on December
18 1, 1997. AR 20. His claim was denied initially and upon reconsideration.
19 AR 20. A video hearing was held on March 22, 2016, before Administrative
20 Law Judge Tom L. Morris. AR 31.

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25 ² The facts are only briefly summarized. Detailed facts are contained in the
administrative hearing transcript, the ALJ's decision, the parties' briefs,
and the underlying records.

26 ³ Plaintiff's motion for summary judgment uses this phrasing:
"Autism/Asperger's" syndrome. *E.g.*, ECF No. 12 at 2.

1 At step one,⁴ the ALJ determined that Plaintiff had not engaged
2 in substantial gainful activity since December 13, 2012, the
3 application date. AR 22-23.

4 At step two, the ALJ concluded that Plaintiff had the following
5 medically determinable severe impairments: learning disorder and
6 affective disorder. AR 23. The ALJ also concluded that Plaintiff's
7 Autism/Asperger's syndrome is no longer a severe impairment. AR 23.

8 At step three, the ALJ found that Plaintiff did not have an
9 impairment or combination of impairments that meets or medically equals
10 the severity of one of the listed impairments. AR at 23-24.

11 At step four, the ALJ found that Plaintiff had the residual
12 functional capacity to perform a full range of work at all exertion
13 levels, with several non-exertional limitations: Plaintiff is capable
14 of performing unskilled work tasks, understanding and recalling simple
15 routine tasks, and can have occasional contact with co-workers and
16 changes in the work environment; his work should have an emphasis on
17 dealing with things and objects rather than people; he can do no work
18 performed at production rates, but he can perform goal-oriented work;
19 and he is off-task about 10% over the course of a workday. AR 24.

20 In reaching these conclusions, the ALJ found that Plaintiff's
21 medically determinable impairments could reasonably be expected to
22 cause the alleged symptoms. AR 25. However, the ALJ also concluded that
23 claimant's statements concerning the intensity, persistence and
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25 ⁴ The applicable five-step disability determination process is set forth in
26 the ALJ's decision, AR 20-21, and the Court presumes the parties are well
acquainted with that standard process. As such, the Court does not restate
the five-step process in this order.

1 limiting effects of those symptoms were not entirely consistent with
2 the medical evidence and other evidence in the record. AR 25.

3 In determining Plaintiff's RFC, the ALJ gave significant weight
4 to the opinions of Dr. Thomas Genthe, examining psychologist and Dr.
5 Anita Peterson, the state agency medical consultant. AR 26-27. The ALJ
6 gave limited weight to the opinions of Plaintiff's teachers, Elizabeth
7 Burgess, Laurie Price, and Mike Greif. AR 27-29. The ALJ also gave
8 limited weight to the opinions of Plaintiff's friend, mother, and
9 grandmother. AR 27-29. No weight was given to the opinion of Dr. Grant
10 Gilbert, because the opinion was dated when the claimant was a child.
11 AR at 29. The ALJ gave limited weight to an individualized education
12 plan (IEP) report from Plaintiff's high school from November 3, 2015,
13 and no weight to an IEP report dated from before Plaintiff turned 18.
14 AR 28.

15 At step five, the ALJ found Plaintiff had no past relevant work
16 and that there are jobs that exist in significant numbers in the
17 national economy that Plaintiff could perform. AR 30-31.

18 The ALJ issued an unfavorable decision on June 14, 2016. AR 31.
19 The Appeals Council denied Plaintiff's request for review, AR 1-6, and
20 he timely appealed to this Court. ECF No. 1.

21 **II. Standard of Review**

22 A district court's review of the Commissioner's final decision is
23 governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
24 limited: the Commissioner's decision will be disturbed "only if it is
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1 not supported by substantial evidence or is based on legal error.”⁵
2 Substantial evidence is “more than a mere scintilla but less than a
3 preponderance; it is such relevant evidence as a reasonable mind might
4 accept as adequate to support a conclusion.”⁶

5 It is the role of the ALJ, not this Court, to weigh conflicting
6 evidence and make credibility assessments. If the evidence in the record
7 “is susceptible to more than one rational interpretation, [the court]
8 must uphold the ALJ’s findings if they are supported by inferences
9 reasonably drawn from the record.”⁷ Further, a district court “may not
10 reverse an ALJ’s decision on account of an error that is harmless.”⁸ An
11 error is harmless “where it is inconsequential to the [ALJ’s] ultimate
12 nondisability determination.”⁹ The party appealing the ALJ’s decision
13 generally bears the burden of establishing that it was harmed.¹⁰

14 **III. Applicable Law & Analysis**

15 **A. The ALJ Did Not Commit Error in Assigning Little Weight to the** 16 **Opinions of Dr. Withers, Ms. Price, Ms. Burgess, and Mr. Grief.**

17 Plaintiff argues that the ALJ failed to adequately consider the
18 opinions of Dr. Angela Withers, Laurie Price, Elizabeth Burgess, and
19 Mike Grief. ECF No. 12 at 6-12. The Court concludes the ALJ’s decision
20 to accord relatively little weight to their opinions was substantially
21 supported by the evidence and not contrary to governing legal standards.
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24 ⁵ *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012).

25 ⁶ *Id.* at 1159 (quoting *Sandgate v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997)).

26 ⁷ *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

⁸ *Id.*

⁹ *Id.* at 1115 (quotation and citation omitted).

¹⁰ *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

1 1. Dr. Angela Withers, School Psychologist

2 Plaintiff argues that the ALJ failed to adequately consider a
3 November 3, 2015 IEP report of Plaintiff, which was completed in part
4 by school psychologist Angela Withers. ECF No 12 at 6-8. The report
5 indicated that Plaintiff suffered from Autism. AR 538-39. The ALJ gave
6 little weight to the report because it contradicted Doctor Thomas
7 Genthe's opinion, AR 513-523, and because the criteria used to determine
8 eligibility for special education is different than the criteria used
9 to evaluate adult disability. AR 28. Plaintiff argues that the report
10 should have been given significant weight because it constitutes a
11 medical opinion from an acceptable medical source. ECF No. 12 at 6-8.
12 The Commissioner contends that, because the IEP is not a formal medical
13 opinion, the ALJ properly gave the IEP little probative weight. ECF No.
14 14 at 15-17.

15 The Court finds that the ALJ assigned appropriate weight to the
16 November 3, 2015 IEP report because Dr. Withers was a non-examining
17 physician. There are three types of physicians: (1) those who treat the
18 claimant (treating physicians); (2) those who examine but do not treat
19 the claimant (examining physicians); and (3) those who neither examine
20 nor treat the claimant, but who review the claimant's file (non-treating
21 physicians). Non-treating physicians are generally afforded less weight
22 than treating or examining physicians.¹¹ Dr. Withers is considered a
23 non-treating physician in this case because Dr. Withers' relationship
24 with Plaintiff did not include medical treatment, but instead included

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26 ¹¹ See 20 C.F.R. § 404.1527(c)(2); *Holohan v. Massanari*, 246 F.3d 1195, 1201-
02 (9th Cir. 2001).

1 determining Plaintiff's eligibility for special education services.¹²
2 The IEP report itself states: "this is [Plaintiff's] triennial
3 reevaluation for special education services." AR 534. Therefore, the
4 ALJ appropriately gave it less weight than the opinion of Dr. Genthe,
5 an examining physician. AR 28, 513-23.

6 Further, the IEP report is not a medical opinion.¹³ Medical opinions
7 are created by acceptable medical sources and reflect judgments about
8 the nature and severity of a claimant's impairments, including symptoms,
9 diagnosis and prognosis, and the claimant's physical or mental
10 restrictions.¹⁴ School psychologists are "acceptable medical sources,"¹⁵
11 but the IEP report is an educational report used to assess special
12 education eligibility. AR 534. Further, it was prepared by not only Dr.
13 Withers, but also by non-acceptable medical sources: two special
14 education teachers and an assistant principal.¹⁶ AR 534-40.

15 As set forth above, the ALJ's decision to accord relatively little
16 weight to the November 3, 2015 IEP report was substantially supported
17 by the evidence and not contrary to governing legal standards.
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22 ¹² An acceptable medical source is not considered a treating source "if [the]
23 relationship with the source is not based on [a] medical need for treatment
24 or evaluation, but solely on your need to obtain a report in support of your
claim for disability...In such a case, [the] acceptable medical source [is
considered] a nontreating source." 20 C.F.R. § 416.927(a)(2).

25 ¹³ *Johnson v. Astrue*, No. EDCV 07-01694-MLG, 2008 WL 4553141, at *3-4 (C.D.
Cal. Oct. 9, 2008)(unpublished).

26 ¹⁴ See 20 C.F.R. § 416.927(a)(1).

¹⁵ 20 C.F.R. § 416.927(a)(1); *McAllister v. Sullivan*, 888 F.2d 599, 602 (9th
Cir. 1989).

¹⁶ *Jamerson v. Chater*, 112 F.3d 1064, 1066-67 (9th Cir. 1997).

1 2. Laurie Price, Teacher

2 Plaintiff argues that the ALJ failed to adequately consider the
3 opinion of his special education teacher, Laurie Price. ECF No 12 at 8-
4 10. AR 524-31.

5 The ALJ's gave sufficient reasons for giving Ms. Price's opinion
6 less probative weight. A special education teacher is not considered an
7 acceptable medical source,¹⁷ rather, special education teachers are
8 considered "other sources."¹⁸ "Other source" testimony regarding a
9 claimant's symptoms or how an impairment affects his or her ability to
10 work is competent evidence, and if the ALJ is to discount it, the ALJ
11 must provide "reasons that are germane to [the] witness." ¹⁹

12 First, the ALJ concluded that Ms. Price's opinion was "more
13 extreme" than the opinion of Dr. Genthe, an examining physician. AR 28-
14 29. An ALJ may discount an "other source" opinion if it is inconsistent
15 with the opinion of an acceptable medical source.²⁰ Substantial evidence
16 supports this finding; Ms. Price opined that Plaintiff had marked or
17 extreme limitations in a number of vocational areas, including
18 understanding and memory, sustained concentration and persistence,
19 social interaction, and adaption. AR 528-29. She further added that
20 Plaintiff would be off-task over 30% of the workday. AR 530. This
21 directly contradicts Mr. Genthe's conclusions that Plaintiff's ability
22 to: (1) sustain attention, concentration, and exert mental control was
23 average; (2) recall verbal and visual information was average; (3) carry

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25 ¹⁷ *Jamerson*, 112 F.3d at 1066-67. See 20 C.F.R. § 416.927(a)(1).

26 ¹⁸ *Tuerner v. Comm'r of Soc. Sec.*, 613 F.3d 1217, 1223-24 (9th Cir. 2010). See
20 C.F.R. § 404.1513(d).

¹⁹ *Tuerner*, 613 at 1223-24.

²⁰ *Britton v. Colvin*, 787 F.3d 1011, 1013 (9th Cir. 2015).

1 out short, simple instructions was good; and (5) interact appropriately
2 with the public, get along with coworkers, and receive criticism from
3 supervisors was unimpaired. AR 521-22.

4 The ALJ also concluded that Ms. Price's opinion was inconsistent
5 with the opinion of Dr. Anita Peterson. AR 28-29. Dr. Peterson opined
6 that Plaintiff was not significantly limited in his ability to
7 understand, remember, and carry out very short and simple instructions,
8 or in his ability to work in coordination with others without being
9 distracted by them. AR 103-04. She further concluded that Plaintiff is
10 moderately limited in his ability to perform activities within schedule,
11 sustain an ordinary routine without supervision, and maintain socially
12 appropriate behavior. AR 103-04.

13 Therefore, the ALJ provided germane reasons, supported by
14 substantial evidence, for giving Ms. Price's opinion less probative
15 weight.

16 3. Elizabeth Burgess, Teacher

17 Plaintiff argues that the ALJ failed to adequately consider the
18 opinion of Plaintiff's other special education teacher, Elizabeth
19 Burgess. ECF No 12 at 10-11.

20 As stated, the ALJ may discount testimony from an "other source"²¹
21 so long as he provides "reasons germane" for doing so.²² The ALJ provided
22 four sufficient reasons: (1) her opinion was inconsistent with
23 Plaintiff's test scores; (2) her conclusions were inconsistent with
24 Plaintiff's daily activities; (3) she assessed Plaintiff using the
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26 ²¹ Jamerson, 112 F.3d at 1066-67.

²² Turner, 613 F.3d at 1223-24.

domains for childhood disability; and (4) she only observed the Plaintiff for one hour per month during the year of evaluation. AR 27.

Ms. Burgess opined that Plaintiff had difficulties in acquiring and using information, attending and completing tasks, interacting and relating with others, and caring for himself, AR 351-58, which the ALJ found contradicted Plaintiff's test results. AR 27. An ALJ may discount an opinion that is inconsistent with test results.²³ As stated, Dr. Genthe concluded that Plaintiff displayed average verbal comprehension, reasoning, working memory, and low-average processing speed. AR 513-23.

Second, the ALJ found that Plaintiff's activities contradicted Ms. Burgess' opinion. AR 27. An ALJ may discredit an "other source" opinion based on its inconsistency with a claimant's daily activities.²⁴ While Ms. Burgess opined that Plaintiff had a serious problem making friends, AR 354, Plaintiff volunteered in a medical center playing with children, played video games with friends, and hung out with friends in school and church. AR. 27, 515.

Third, Ms. Burgess' opinion was in the form of a teacher's questionnaire and assessed Plaintiff using the domains more consistent with assessing childhood disability rather than adult disability.²⁵ AR

²³ *Britton*, 787 F.3d at 1013; *See Roberts v. Shalala*, 66 F.3d 179, 184 (9th Cir. 1995) (upholding the ALJ's rejection of medical opinion because it was inconsistent with neuropsychological testing).

²⁴ *Britton*, 787 F.3d at 1013-14.

²⁵ 20 C.F.R. § 416.913(a)(2)(i) ("[M]edical opinions in adult claims are about impairment-related limitation and restrictions in... your ability to perform physical and demands of work activities, ability to adapt to environmental conditions, such as temperature extremes or fumes). *Cf.* 20 C.F.R. § 416.913(a)(2)(ii) ("Medical opinions in child claims are about acquiring and using information, attending and completing task, interacting with others, moving and manipulating objects, caring for yourself, and physical well-being.").

27, 351. Finally, the ALJ noted that Ms. Burgess spent only a limited time with Plaintiff after he turned eighteen. AR 27.

Therefore, the ALJ provided germane reasons, supported by substantial evidence, for giving Ms. Burgess' opinion little probative weight.

4. Mr. Grief, Teacher

Plaintiff argues that the ALJ failed to adequately consider the opinion of another teacher, Mike Grief. ECF No. 12 at 11-12.

The ALJ provided a sufficient reason to discount the opinion—Mr. Grief's opinion did not comport with Plaintiff's daily activities.²⁶ AR. 28. In a teacher's questionnaire, Mr. Greif opined that Plaintiff had a serious problem focusing long enough to finish an assigned activity or task, working at a reasonable pace, working without distracting himself or others, and expressing ideas in written form. AR. 320-21. He further opined that Plaintiff had some difficulty in areas related to acquiring and using information, interacting with others, and caring for himself. AR. 320-24. The ALJ reasonably concluded that his opinion was inconsistent with Plaintiff's demonstrated skills in that area, including his ability to make, edit, and post over 300 YouTube videos. Ar. 28, 59, 319. These skills indicate that Plaintiff had a greater ability to focus and complete tasks, work without distraction, and acquire and use information than alleged.

²⁶ *Tuerner*, 613 F.3d at 1223-24; *Jamerson*, 112 F.3d at 1066-67; *Britton*, 787 F.3d at 1013. See 20 C.F.R. § 416.927(a)(1).

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2 **B. The ALJ Did Not Improperly Reject Lay Witness Testimonies**

3 An ALJ need only give germane reasons for discrediting the
4 testimony of lay witnesses.²⁷ The ALJ proffered sufficient reasons for
5 discounting the statements of Plaintiff's mother, grandmother, and
6 family friend.

7 Plaintiff's mother, Kathy B., appeared at the hearing and testified
8 that Plaintiff had emotional outbursts and difficulty staying on task
9 without reminders. AR 61-63. In her opinion, Plaintiff did not have the
10 ability to live independently and had only one friend who did not
11 tolerate him well. AR at 64-70. She also noted that Plaintiff's speech
12 issues had worsened due to his need for oral surgery. AR. 70-71. The
13 ALJ concluded that Plaintiff's mother's testimony was inconsistent and
14 that she neglected to bring up certain details. AR 29.

15 Plaintiff's grandmother, Linda Einspahr, provided a third-party
16 statement. AR 548. Ms. Einspahr noted that Plaintiff struggles with
17 changes in routine and accepting consequences, needs regular reminders
18 to complete daily tasks, has emotional meltdowns, self-isolates, and
19 has difficulty discerning between serious and humorous situations. AR
20 548. She also noted his speech difficulties. AR 548. The ALJ concluded
21 that Ms. Einspahr's description portrayed an individual with some
22 functional limitations, but not one who is completely disabled. AR 29.

23 Family friend Robin Mitchell also provided a third party statement
24 recounting Plaintiff's numerous meltdowns, difficulty transitioning,
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²⁷ *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001).

1 inability to follow a set plan of action, and inappropriate behavior at
2 his volunteer jobs. AR 550. The ALJ gave the opinion little weight
3 because the alleged behaviors were not further described. AR 30.

4 Therefore, the ALJ provided germane reasons, supported by
5 substantial evidence, for giving Plaintiff's mother, grandmother, and
6 Robin Mitchell's opinions less probative weight.

7 **C. The ALJ Did Not Err by Rejecting Plaintiff's Subjective Symptom**
8 **Complaints.**

9 Plaintiff asserts that the ALJ erred by discrediting Plaintiff's
10 subjective symptom testimony. ECF No. 12 at 16-18.

11 Plaintiff alleges that he cannot work because of deficits related
12 to Autism/Asperger's syndrome, learning disorder, and affective
13 disorder. ECF No. 12 at 2. At his hearing, Plaintiff testified that he
14 needs constant reminders to complete household chores and self-care
15 activities due to forgetfulness. AR 46-47.

16 The ALJ engages in a two-step analysis to determine whether a
17 claimant's testimony regarding subjective pain or symptoms is credible.
18 "First, the ALJ must determine whether there is objective medical
19 evidence of an underlying impairment which could reasonably be expected
20 to produce the pain or other symptoms alleged."²⁸ Second, "[i]f the
21 claimant meets the first test and there is no evidence of malingering,
22 the ALJ can only reject the claimant's testimony about the severity of
23 the symptoms if [the ALJ] gives 'specific, clear and convincing reasons'
24 for the rejection."²⁹ An ALJ must make sufficiently specific findings

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26 ²⁸ *Molina*, 674 F.3d at 1112.

²⁹ *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (quoting *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007)).

1 "to permit the court to conclude that the ALJ did not arbitrarily
2 discredit [the] claimant's testimony."³⁰ General findings are
3 insufficient.³¹ However, courts may not second-guess ALJ findings that
4 are supported by substantial evidence.³²

5 In making an adverse credibility determination, an ALJ may
6 consider, among other things, (1) the claimant's reputation for
7 truthfulness; (2) inconsistencies in the claimant's testimony or between
8 his testimony and his conduct; (3) the claimant's daily living
9 activities; (4) the claimant's work record; and (5) the nature,
10 severity, and effect of the claimant's condition.³³

11 The ALJ found that Plaintiff's medically determinable impairments
12 could be reasonably expected to cause the alleged symptoms, but that
13 Plaintiff's statements concerning the intensity, persistence and
14 limiting effects of those symptoms were not entirely consistent. AR 25.
15 The ALJ provided three reasons for discounting Plaintiff's symptom
16 testimony: (1) Plaintiff's daily activities undermined the alleged
17 severity of his learning disorder, Asperger's syndrome, and depression;
18 (2) Plaintiff inadequately explained lack of treatment; (3) the opinion
19 and medical findings of Plaintiff's examining physicians contravened
20 Plaintiff's allegations. AR 24-26.

21 First, the ALJ found that Plaintiff's daily activities undermined
22 his subjective symptom complaints. AR 25-26. The Ninth Circuit has
23 "repeatedly warned that ALJs must be especially cautious in concluding
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25 ³⁰ *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008) (citations
omitted).

26 ³¹ *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir 1995).

³² *Id.*

³³ *Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th Cir. 2002).

1 that daily activities are inconsistent with testimony about pain,
2 because impairments that would unquestionably preclude work and all the
3 pressures of a workplace environment will often be consistent with doing
4 more than merely resting in bed all day."³⁴ To that end, "many home
5 activities are not easily transferable to what may be the more grueling
6 environment of the workplace, where it might be impossible to
7 periodically rest or take medication."³⁵ Accordingly, a claimant's daily
8 activities should not have a negative impact on credibility unless those
9 activities contradict the claimant's other testimony or are transferable
10 to a work setting.³⁶

11 The ALJ concluded that Plaintiff's allegations of
12 Autism/Asberger's syndrome and depression were contradicted because
13 Plaintiff graduated high school with mostly A's and B's, AR 48, 50-51,
14 plans to attend college, AR. 48, plays video games and has made hundreds
15 Youtube videos, AR 59, and does household chores with reminders. AR 25-
16 26, 46. The ALJ concluded that these activities reflect that any
17 difficulties claimant faces do not preclude work activities as an adult.
18 AR 25. The ALJ also noted that, despite allegations of severe social
19 limitations, Plaintiff engaged in volunteer work through a school
20 program and volunteered at a medical center. AR 25-26, 43-44, 514.
21 Plaintiff also attended church regularly and spent time with friends in
22 school. AR 26, 515.

23 Second, the ALJ found that Plaintiff inadequately explained his
24 lack of treatment, which undermined the reliability of his symptom

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26 ³⁴ *Garrison v. Colvin*, 759 F.3d 995, 1016 (9th Cir. 2014).

³⁵ *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).

³⁶ *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007).

1 testimony. AR 26. An ALJ may reject symptom testimony "if the level or
2 frequency of treatment is inconsistent with the level of complaints[.]"³⁷
3 The ALJ considered that Plaintiff's lack of treatment may be due to
4 financial restraints, AR 26, but the ALJ also pointed out Plaintiff's
5 own statements: Plaintiff stated that the only reason he was unable to
6 sustain full-time employment was the fact that he had, until recently,
7 been in school. AR 26, 515. Plaintiff also denied a history of
8 significant medical problems. AR 26, 513-14.

9 Finally, the ALJ found that the opinions and medical findings of
10 Plaintiff's examining physicians contravened allegations of disabling
11 symptoms and limitations. AR 26. An ALJ may discount a claimant's
12 symptom testimony that is unsupported by medical opinion evidence and
13 examination findings.³⁸ Dr. Peterson acknowledged Plaintiff alleged a
14 history of autism, but noted that there was no record for its diagnosis.
15 AR 101.³⁹

16 The ALJ provided specific, clear, and convincing reasons for
17 discrediting Plaintiff's symptom testimony supported by substantial
18 evidence in the record. The ALJ therefore did not err in making an
19 adverse credibility finding as to Plaintiff's symptom testimony.
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23 ³⁷ *Molina*, 674 F.3d at 1113 (citations omitted).

24 ³⁸ *Stubbs-Danielson v. Asture*, 539 F.3d 1169, 1175 (9th Cir. 2008); *Batson v.*
25 *Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1196 (9th Cir. 2004). *See Rollins*
26 *v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001) (explaining that medical
evidence is a relevant factor in determining the severity of the claimant's
pain and its disabling effects).

³⁹ AR 101 ("ASD/Autism dx is alleged, but if such a dx wad made, no record
exists. The label has been carried forward in school records, whether
appropriate or not.")

1 **D. The ALJ Did Not Improperly Reject Plaintiff's Severe Impairment.**

2 Plaintiff alleges that the ALJ erred by discrediting Plaintiff's
3 severe impairment of Autism/Asperger's Syndrome. ECF No. 12 at 16-18.

4 At step two, the claimant has the burden to show that he has a
5 medically severe impairment or combination of impairments.⁴⁰ The ALJ
6 will only find an impairment to be severe if it "significantly limits
7 [Plaintiff's] physical or mental ability to do basic work activities."⁴¹
8 "An impairment is considered 'not severe' if it is a slight abnormality
9 that causes no more than minimal limitations in the individual's ability
10 to function independently, appropriately, and effectively in an age-
11 appropriate manner."⁴² If the ALJ erred in failing to find a condition
12 to be a severe impairment, the Ninth Circuit has held that the error is
13 harmless when the ALJ considers the limitations posed by the alleged
14 conditions at a later step.⁴³

15 Because the ALJ resolved step two in Plaintiff's favor and
16 considered the limitations that Plaintiff alleged related to
17 Autism/Asperger's syndrome later in the sequential evaluation, AR 26,
18 any error was harmless. The ALJ concluded that Plaintiff's
19 Autism/Asperger's syndrome was not a severe impairment, AR 23, and cited
20 Dr. Genthe's opinion, which did not identify Asperger's syndrome or
21 Autism. AR 23, 101, 513-23. However, the ALJ found that Plaintiff did
22 have severe impairments: learning and affective disorders. AR 23. The
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24 ⁴⁰ *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999).

25 ⁴¹ 20 C.F.R. § 416.920(c).

26 ⁴² SSR Pub. No. 96-30; 20 C.F.R. § 916.920(c).

⁴³ *Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007); See also *Buck v. Berryhill*, 869 F.3d 1040, 1049 (9th Cir. 2017) (finding any error at step two harmless because step two was resolved in claimant's favor).

1 ALJ accounted for the limitations that Plaintiff alleges are related to
2 his Autism/Asperger's syndrome by restricting Plaintiff to only
3 occasional contact with co-workers, occasional changes in the work
4 environment, and work emphasizing dealing with things/objects rather
5 than people. AR 24.⁴⁴

6 **E. The ALJ Did Not Err by Finding Plaintiff Did Not Meet a Listing.**

7 Plaintiff argues the ALJ erred by finding Plaintiff did not meet
8 a listing. AR 23-24. Plaintiff asserts that proper consideration of the
9 medical opinion evidence warrants a finding that Plaintiff meets or
10 equals Listings 12.04, 12.05, and 12.10. ECF No. 12 at 13.

11 At step three, the ALJ determines if a claimant's impairment meets
12 or equals an impairment listed in Appendix 1 to Subpart P of Regulations
13 No. 4. The Listing of Impairments describes specific impairments of each
14 of the major body systems "which are considered severe enough to prevent
15 a person from doing any gainful activity."⁴⁵ If a claimant meets or
16 equals a listed impairment he or she will be found disabled at this step
17 without further inquiry.⁴⁶

18 The medical opinion evidence in the record indicates that Plaintiff
19 is able to work: both of Plaintiff's examining physicians opined that
20 Plaintiff was not disabled. Ar. 101-06, 521-22. Accordingly, the ALJ's
21 finding that Plaintiff did not meet listing 1.02, AR 22, was supported
22 by substantial evidence.

23
24 ⁴⁴ Further, even if the ALJ did not account for the impairments alleged by
25 Plaintiff to their full severity, for the reasons outlined above, the ALJ
26 properly weighed the opinions of Dr. Withers, Ms. Price, Ms. Burgess, and
Mr. Grief. The ALJ's determination of Plaintiff's impairments and their
severity were properly supported by substantial evidence in the record.

⁴⁵ See 20 C.F.R. § 404.1525.

⁴⁶ See 20 C.F.R. § 404.1520(d).

1 **F. The ALJ Did Not Fail to Meet His Step Five Burden.**

2 At step five, the Commissioner has the burden to identify specific
3 jobs existing in substantial numbers in the national economy that
4 claimant can perform despite their identified limitations.⁴⁷ At an
5 administrative hearing, an ALJ may solicit vocational expert (VE)
6 testimony as to the availability of jobs in the national economy.⁴⁸ A
7 VE's testimony may constitute substantial evidence of the number of jobs
8 that exist in the national economy.⁴⁹ The ALJ's decision regarding the
9 number of alternative occupations must be supported by substantial
10 evidence.⁵⁰

11 Plaintiff argues that the ALJ's hypothetical failed to take into
12 account the limitations set forth by Dr. Withers, Ms. Price, Ms.
13 Burgess, and Mr. Grief. AR 30, 76-81. However, this argument merely
14 restates Plaintiff's earlier allegations of error, which are not
15 supported by the record. Accordingly, the ALJ's hypothetical properly
16 accounted for the limitations supported by the record.⁵¹

17 **G. The ALJ Did Not Improperly Fail to Award the Claimant Child**
18 **Disability Benefits Through December 13, 2013.**

19 Plaintiff argues that a child may continue to receive child
20 benefits until age nineteen if he is still a student in high school or
21 equivalent education program. ECF No. 12 at 19.

23 ⁴⁷ *Johnson v. Shalala*, 50 F.3d 1428, 1432 (9th Cir. 1995). See 20 C.F.R.
§ 416.920(g).

24 ⁴⁸ *Tackett v. Apfel*, 180 F.3d 1094, 1100 (9th Cir. 2011).

⁴⁹ *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005).

25 ⁵⁰ *Farias v. Colvin*, 519 F. App'x 439, 440 (9th Cir. 2013)(unpublished). See
Hill v. Astrue, 698 F.3d 1153, 1158 (9th Cir. 2012).

26 ⁵¹ See *Magallanes v. Bowen*, 881 F.2d 747, 756-57 (9th Cir. 1989) (holding it
is proper for the ALJ to limit a hypothetical to those restrictions supported
by substantial evidence in the record).

1 A child may continue to receive child benefits until age 19 if
2 still a student in high school.⁵² However, this rule applies to children
3 who receive social security dependents benefits or disabled adult
4 children benefits, and it is thereby inapplicable to the case at hand.⁵³
5 The ALJ determined that Plaintiff was not disabled as of his eighteenth
6 birthday, pursuant to Section 1614(a)(3)(H)(iii) of the Social Security
7 Act.⁵⁴ AR 31.

8 IV. Conclusion

9 Accordingly, **IT IS HEREBY ORDERED:**

10 1. Plaintiff's Motion for Summary Judgment, **ECF No. 12**, is
11 **DENIED.**

12 2. The Commissioner's Motion for Summary Judgment, **ECF No. 14**,
13 is **GRANTED.**

14 3. The Clerk's Office shall enter **JUDGMENT** for Plaintiff.

15 4. The case shall be **CLOSED.**

16 **IT IS SO ORDERED.** The Clerk's Office is directed to file this
17 Order, enter Judgment for Plaintiff, provide copies to all counsel, and
18 close the file.

19 **DATED** this 18th day of September 2018.

20 _____s/Edward F. Shea
21 EDWARD F. SHEA
22 Senior United States District Judge
23

24 ⁵² POMS RS 00205.325; SSA Pub. No. 05-10085.

25 ⁵³ See POMS RS 00205.001 (stating that eligibility for student benefits); RS
26 00203.001 ("child benefits include benefits for minor children, students,
and disabled adult children."); RS 00203.080 (definition of disability for
child disability benefits is the same as for disability insurance cases: an
inability to engage in any substantial gainful activity).

⁵⁴ 42 U.S.C. § 1382c(a)(3)(H)(iii).